UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

ALFRED LeFLORE, Petitioner, vs. JOHN MATHIS, Warden, Respondent.	No. C01-2076-MWB **REPORT AND RECOMMENDATION ON RESPONDENT'S MOTION TO DISMISS**

This matter is before the court on a motion to dismiss filed by the respondent John Mathis ("Mathis") on March 20, 2003. (*See* Doc. No. 43, erroneously titled "Petitioner's Motion to Dismiss") Mathis filed a brief in support of his motion (Doc. No. 44), as well as a brief on the merits of the petitioner's petition for writ of *habeas corpus*. Mathis seeks dismissal of the petition filed by the petitioner Alfred LeFlore ("LeFlore"), on the basis that LeFlore has now been released from custody, and he has alleged no collateral consequences, rendering his petition moot.

On December 19, 2001, Chief Judge Mark W. Bennett referred this matter to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition. Based on the procedural history of this case, discussed fully below, the court finds it is not necessary to await LeFlore's response to the motion to dismiss before considering the motion.

I. Procedural History

LeFlore commenced this action on November 19, 2001, with the filing of a petition for writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. The court appointed an attorney to represent LeFlore. The attorney later withdrew due to a conflict of interest, and on December 18, 2001, the court appointed another attorney to represent LeFlore in this action. Mathis filed a motion to dismiss on January 7, 2002, on the basis of LeFlore's original petition. With the assistance of counsel, LeFlore filed an amended petition on April 19, 2002 (Doc. No. 21), and Mathis withdrew his motion to dismiss on May 20, 2002 (Doc. No. 24), and filed an Answer (Doc. No. 25) to LeFlore's Amended Petition.

The court established a briefing schedule that required LeFlore to file his opening brief by August 23, 2002. LeFlore's counsel filed a timely motion for extension of time on August 21, 2002. (Doc. No. 27) The request was granted, and the deadline for LeFlore's brief was extended to September 30, 2002. (Doc. No. 28) On September 25, 2002, counsel file a second application for extension of time. (Doc. No. 29) The motion was granted, and the deadline was extended to November 4, 2002, with a notation that no further extensions would be granted absent a showing of extraordinary cause. (Doc. No. 30)

In response to the court's order extending the deadline to November 4, 2002, the court received an *ex parte* letter from LeFlore, in which he requested a copy of all the filings in this case, and also requested leave to file a *pro se* brief on the merits. The court directed the Clerk of Court to send a copy of LeFlore's file to him at his home address in Renton, Washington. The court directed LeFlore to file any *pro se* brief he deemed appropriate by November 11, 2002, and also advised LeFlore that he could file a reply brief, if desired, after Mathis filed his brief on the merits. Further, the court noted it appeared LeFlore had been released from custody, and advised the parties that if he had, they should address in their briefs whether LeFlore had alleged sufficient collateral consequences to avoid mootness. (*See* Doc. No. 31 & n.1)

The court subsequently was informed by LeFlore's attorney that she had been unable to contact LeFlore to discuss the merits of his case. The court held a telephonic hearing with counsel for both parties on October 31, 2002, and directed LeFlore's attorney to file a third application for extension of time containing a recitation of counsel's difficulties contacting LeFlore. Counsel complied, and on November 5, 2002, filed a Report to the Court (Doc. No. 33), in which counsel noted she had attempted to contact LeFlore at the Iowa State Penitentiary, and had been informed LeFlore had been released. Counsel noted that although she had obtained LeFlore's address in Washington, she did not have a phone number to contact LeFlore.

On November 7, 2002, the court ordered LeFlore's opening brief to be filed by December 31, 2002, or his case would be subject to dismissal for failure to comply with an order of the court. The court directed Mathis's attorney to serve a copy of the order on LeFlore by certified mail, at the last-known address in the State's records. Counsel complied, and on November 25, 2002, the court received another *ex parte* letter from LeFlore. LeFlore suggested a "phone call with [his] attorney" might be appropriate, but he failed to provide a phone number for telephonic contact. The court ordered LeFlore to provide his attorney with a contact telephone number by December 9, 2002, and to advise counsel of the times when he would be available at such number. (Doc. No. 36)

Counsel apparently was able to communicate with LeFlore, because on December 27, 2002, counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 13 L. Ed. 2d 493 (1967)[1], in which counsel set forth the issues LeFlore

[1] *Anders* stands for the proposition that when counsel finds a defendant's case "to be wholly frivolous, after a conscientious examination of it, [counsel] should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal." 386 U.S. at 744, 87 S. Ct. at 1400. The defendant may respond, and then if the court, on its own review of the record, agrees the case is wholly frivolous, the court may grant the motion to withdraw and dismiss the case. If, on the other hand, the court finds any of the claims not to be (continued…)

wanted counsel to raise, and requested LeFlore be allowed to file any *pro se* brief he might deem advisable. (Doc. No. 38) On January 2, 2003, the court entered an order noting LeFlore's counsel had filed an *Anders* brief, and directing LeFlore to file any *pro se* brief he chose to file by January 27, 2003. (Doc. No. 39) LeFlore's attorney filed a Report to the Court on January 22, 2003, in which counsel stated she had sent LeFlore a copy of the court's January 2nd order.[2] Nothing further has been filed on LeFlore's behalf, and the court has received no further communication from LeFlore, *ex parte* or otherwise.

On March 20, 2003, Mathis filed his present motion to dismiss. Mathis argues LeFlore's release from custody renders his petition moot because LeFlore has failed to allege collateral consequences. The issues LeFlore raises in his petition are, first, whether an administrative law judge improperly sanctioned him with the loss of 1,095 days of good time credit, resulting in an illegal lengthening of his sentence; and second, whether he was denied or not properly credited with good time credit during his incarceration, again resulting in an illegal extension of his sentence.

II. Discussion

The court must determine whether it has jurisdiction to consider LeFlore's case on the merits. LeFlore has the duty to "show the subsistence of a case or controversy in this court." *Hohn v. United States*, 262 F.3d 811, 815 (8th Cir. 2001) (citing *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990)). To paraphrase the *Hohn* court, LeFlore must show his case is not moot despite his release from prison. *See id.*, 262 F.3d at 815-16.

---

[1](…continued)
frivolous, then the court must provide the assistance of counsel to argue the case. *Id.*

[2]In addition, in the court's order of October 21, 2002 (Doc. No. 31), the court directed the Clerk of Court to send copies of all filings in this case to LeFlore at his Washington address.

Under a general mootness inquiry, the court lacks jurisdiction to consider LeFlore's petition. He is no longer in prison. Therefore, any extension of his sentence for disciplinary reasons has become moot. Jurisdiction is absent because LeFlore has not presented the court with a viable case or controversy. *See Spencer v. Kemna*, 523 U.S. 1, 7-8, 118 S. Ct. 978, 983, 140 L. Ed. 2d 43 (1998).

There are, however, exceptions that could allow LeFlore's petition to survive the general mootness inquiry. The Eighth Circuit Court of Appeals has held, "If a petitioner, though released from custody, faces sufficient repercussions from his allegedly unlawful punishment, the case is not moot." *Leonard v. Nix*, 55 F.3d 370, 372-73 (8th Cir. 1995) (citing *Carafas v. LaVallee*, 391 U.S. 234, 239-40, 88 S. Ct. 1556, 1560-61, 20 L. Ed. 2d 554 (1968)). "Collateral consequences are presumed to stem from a criminal conviction even after release," *Leonard, id.*, and only the possibility of collateral consequences must be present to avoid mootness. *Sibron v. New York*, 392 U.S. 40, 57, 88 S. Ct. 1889, 1899, 20 L. Ed. 2d 917 (1968).

In *Hohn v. United States*, 262 F.3d 811 (8th Cir. 2001), the court explained:

> Even when a litigant is unable to meet the requirements of the general mootness inquiry, the litigant may invoke an exception to the mootness doctrine to gain judicial review. There are four exceptions to the mootness doctrine, so that a court will not dismiss a case as moot if: (1) secondary or "collateral" injuries survive after resolution of the primary injury; (2) the issue is deemed a wrong capable of repetition yet evading review; (3) the defendant voluntarily ceases an allegedly illegal practice but is free to resume it at any time; or (4) it is a properly certified class action suit.

Hohn, 262 F.3d at 817 (citations omitted). LeFlore can avoid mootness despite his release from custody if he can meet one of the four criteria specified by the Eighth Circuit in *Hohn*. Notably, any collateral consequences must be independent of the underlying conviction to

avoid mootness upon physical release from custody. *Leonard,* 55 F.3d at 373 (citations omitted).

> Where the allegedly illegal punishment does not produce any collateral consequences independent of the underlying conviction, the case will be mooted by physical release. *See Lane v. Williams*, 455 U.S. 624, 632-33, 102 S. Ct. 1322, 1327-28, 71 L. Ed. 2d 508 (1982) (parole violation has no collateral consequences); *Cox v. McCarthy*, 829 F.2d 800, 803 (9th Cir. 1987) (objection to ***penalty*** rather than conviction not enough to avoid mootness).

Id. (emphasis added).

In the present case, LeFlore has not alleged *any* collateral consequences resulting from the disciplinary sanctions imposed upon him while he was incarcerated, nor has he raised the possible impairment of a hypothetical 1983 action as a collateral consequence if he is not allowed to proceed with this *habeas* action. Even if LeFlore were to attempt to raise these new issues now, in response to Mathis's motion to dismiss, the court finds such claims would be untimely, and would come too late to confer jurisdiction upon this court.

Accordingly, the court finds LeFlore's petition was rendered moot by his release from custody. Further, the court finds LeFlore has failed to meet any of the exceptions to the general mootness doctrine described by the *Hohn* court. *See Hohn, supra,* 262 F.3d at 817. Therefore, the court finds Mathis's motion to dismiss should be granted.

III. Certificate of Appealability

A prisoner must obtain a certificate of appealability from a district or circuit judge before appealing from the denial of a federal habeas petition. *See* 28 U.S.C. § 2253(c). A certificate of appealability is issued only if the applicant makes a substantial showing of the denial of a constitutional right. *See Roberts v. Bowersox*, 137 F.3d 1062, 1068 (8th Cir. 1998).

The court finds LeFlore has not raised issues which might constitute a substantial showing that he was deprived of a constitutional right. Accordingly, the court recommends a certificate of appealability not be granted.

IV. Conclusion

For the reasons discussed above, **IT IS RECOMMENDED**, unless any party files objections[3] to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that Mathis's motion to be dismiss be granted and LeFlore's petition be dismissed with prejudice.

IT IS SO ORDERED.

DATED this 1st day of April, 2003.

_____
PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[3]Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).